United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

77-1222

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BENJAMIN RODRIGUEZ,

Defendant-Appellant.

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PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

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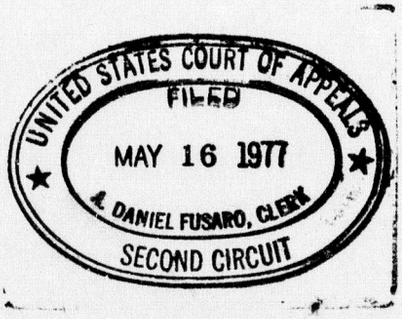

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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Docket No. 77-1222

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PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Defendant-appellant, BENJAMIN RODRIGUEZ, by his attorneys, ALBERT J. KRIEGER and JOSEPH BEELER, respectfully petitions this Court pursuant to Rule 40 of the Federal Rules of Appellate Procedure to grant a rehearing, to vacate its May 3, 1977, judgment and order summarily dismissing defendant-appellant's appeal, and to reinstate said appeal for plenary consideration by the Court.

Further, defendant-appellant respectfully suggests pursuant to Rule 35 of the Federal Rules of Appellate Procedure that a rehearing in banc is appropriate and necessary to secure or maintain uniformity of this Court's decisions concerning the appealability, prior to trial, of District Court refusals to dismiss prosecutions allegedly barred by due process or double jeopardy.

PRELIMINARY STATEMENT

On September 15, 1976, defendant-appellant was indicted in two counts charging income tax evasion for the years 1969 and 1970. He filed a motion to dismiss the indictment on grounds (1) that the defendant has been denied due process by the government's retaliatory indictment of him following the assertion of his legal rights in connection with a previous tax evasion indictment arising out of the same Internal Revenue Service investigation and (2) that the government's highly burdensome serial prosecution tactics also offend due process and/or proper standards for the administration of criminal justice in the federal courts enforceable under the Court's supervisory power.

On April 15, 1977, following the submission of numerous affidavits and memoranda by the parties and the hearing of oral argument, the District Court filed a Memorandum decision denying the motion to dismiss. On April 18, 1977, defendant-appellant's notice of appeal was filed.

On April 21, 1977, the plaintiff-appellee government filed a motion to dismiss the appeal summarily under Rule 27(a) of the Federal Rules of Appellate Procedure asserting that the District Court crder could not be appealed. On May 3, 1977, a panel of this Court (consisting of Circuit Judges Timbers and Meskill and District Judge vanPelt Bryan) granted the government's motion and thus dismissed the appeal summarily.

STATEMENT OF FACTS

1. On April 14, 1974, the prosecution obtained the return of a two-count indictment against defendant, No. 74 Cr 421 (RLC). The indictment charged him, in Count I, with attempting to evade income taxes for the year 1967 in violation of 26 U.S.C. §7201 by omitting in his 1967 tax return certain income received and, similarly, in Count II, with submitting a false income tax return for the year 1967 in violation of 26 U.S.C. §7206(1) by failing to report that additional income. Although the statutes each carried a potential five year sentence, as a legal matter sentencing for two offenses would not have been permissible and therefore defendant's maximum exposure to imprisonment under this indictment was a five year term. No other charges were brought at this time.

The defendant responded to the indictment by asserting various legal rights which included pleading not guilty, successfully seeking mitigation of sentence, and commencing an appeal at which juncture the prosecution obtained the return of the present indictment against him.

The new tax evasion charges, involving tax years 1968 and 1969, are predicated on facts known to the prosecution at the time of the initial charging decision in April 1974 and long before the accused exercise his various rights. The counts

each carry a potential five year penalty and therefore together expose defendant to a consecutive maximum of ten year's additional punishment. No other charges were brought out of reserve at the time of bringing the new indictment but the defendant anticipates that the government will next indict him for tax years 1970 and 1971.

2. Defendant moved the District Court to dismiss the prosecution. He argued that since this new indictment against him was obtained only following the assertion of his legal rights, the opportunities for vindictiveness inherent in the situation preclude the government under Blackledge v. Perry, 417 U.S. 21 (1974) from prosecuting him any further on facts known to it when it made the choice to bring the 1974 indictment to trial. See United States v. DeMarco, ___ F.2d ___, 21 CrL 2110, 9th Cir. March 30, 1977; Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976); United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976); United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974). Defendant also argued that the indictment should be dismissed as an abuse of process (contrary to due process and/or to public policy remediable under the supervisory power), since the serial prosecution of him not only flouts all considerations of justice, economy and convenience and undermines the values protected by speedy trial and

double jeopardy guarantees, but also amounts to vexatious harassment of him and imposition upon the federal courts. See United States v. American Honda Motor Co., 273 F.Supp. 810 (N.D. Ill. 1967); United States v. American Honda Motor Co., 271 F.Supp. 979 (N.D. Calif. 1967). See also, Hoag v. New Jersey, 356 U.S. 464 (1958).

Since the questions posed by this petition for rehearing with suggestion for rehearing in banc are, first, the power of a panel of this Court to overturn Circuit precedent and, second, the appealability of an order denying a Blackledge v. Perry claim, further recitation of the merits is unnecessary. See United States v. Alessi, 544 F.2d 1139, 1152 n.11 (2d Cir.), cert. denied, ___ U.S. ___, 97 S.Ct. 384 (1976).

3. The District Court denied the motion (with some misgivings) and the defendant appealed. The government's memorandum of law in support of its motion to dismiss the appeal acknowledged that Second Circuit precedent authorized similar appeals. United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975)(denial of double jeopardy claim appealable prior to trial); United States v. Alessi (Alessi I), 536 F.2d 978 (2d Cir. 1976) (denial of due process claim that indictment violated plea bargain appealable prior to trial); United States v. Alessi (Alessi II), 544 F.2d 1139 (2d Cir.) (same), cert. denied, ___ U.S. ___, 97 S.Ct. 384 (1976). But,

basically, the government urged the motion panel summarily to follow Judge Friendly's critical dictum in Alessi II and to ignore his contrary holding, after full argument, which was in conformity with Circuit precedent.

Defendant argued that the rule of Blackledge v. Perry, 417 U.S. 21 (1974) is one of simple preclusion directly analogous to the prohibition against double jeopardy. And he noted that the Blackledge v. Perry doctrine, although founded on due process, more resembles the double jeopardy guarantee reviewable under the United States v. Beckerman line of cases than the breached plea bargain due process claims reviewable under the Alessi cases. Finally, defendant argued that to grant the government's motion to dismiss under Rule 27(a) and deny the defendant a plenary hearing on his appeal would accomplish in summary fashion precisely what Judge Friendly would not do, even after full argument, without en banc reconsideration. Alessi II, 544 F.2d at 1143 and 1152.

And this, of course, is precisely what the panel did.

INTRODUCTION TO AND SUMMARY OF ARGUMENT

Stare decisis. Precedent. Rule of Law. Are these old fashioned values disposable when new fashioned doctrines create new rights for the criminally accused?

No principled basis has been offered for distinguishing defendant's Blackledge v. Perry claim from the double jeopardy and due process claims of Beckerman and the Alessi cases. None exists. Yet, defendant's appeal has been dismissed on motion by a panel of this Court.

The majority in Alessi II considered itself "constrained by contrary precedent in this circuit". 544 F.2d at 1152. The panel herein, respectfully, did not.

The departure from principle--and the haste of the process--are of course wrong. The obvious division of opinion among the Judges of this Circuit concerning the availability, under 28 U.S.C. § 1291, of pre-trial appeals for defendants in criminal cases demands in banc rehearing. If the Second Circuit is to secure and maintain the uniformity and integrity of its decisions, then panels must reasonably and faithfully apply precedent or rehearing in banc must be granted to resolve the differences. Anything else is roulette.

ARGUMENT

The defendant-appellant's basic theory is that he is being subjected to vindictive retaliatory prosecution as a consequence of his assertion of various rights. In Blackledge v. Perry, 417 U.S. 21 (1974), the Supreme Court condemned Government procedures which contained even a "potential for vindictiveness", 417 U.S. at 28, and held that the claim, because of its nature, could be raised even following a guilty plea to the charges. 417 U.S. at 29-32.

A Blackledge v. Perry claim goes "to the very power of the State to bring the defendant into Court to answer the charge brought against him." 417 U.S. at 30. The rule of that case is one of simple preclusion, id., and, it is directly analogous to the prohibition against double jeopardy, 417 U.S. at 30-31:

> ...The right that [Perry] asserts and that we today accept is the right not to be haled into court at all upon a felony charge. The very initiation of the proceedings against him in the Superior Court thus operated to deny him due process of law.
>
> Last Term in Robinson v. Neil, 409 U.S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that 'its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.' Id., at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment is based. The 'practical result' dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge.
> (Emphasis in original)

See also, 417 U.S. at n.8.

The law of this Circuit authorizes pretrial appeal of double jeopardy and due process claims, despite the Assistant United States Attorney's unhappiness with that law. The Third, Fourth and Eighth Circuits also allow review of double jeopardy claims as an exception to the usual rule against pretrial appeals by the defendant in a criminal case. United States v. DiSilvio, 520 F.2d 247 (3rd Cir.), cert. denied, __ U.S. __ (1975); United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972); United States v. Barket, 530 F.2d 181 (8th Cir. 1975), cert. denied, ___ U.S. ___ (Nov. 1, 1976) (No. 75-1280). The Sixth Circuit can also be counted as in accord with this view. Thomas v. Beasley, 491 F.2d 507 (6th Cir. 1974). Similarly, the Fourth Circuit has allowed interlocutory appeal to review the denial of a speedy trial claim. United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976), petition for cert. filed June 29, 1976 (No. 75-1892).

In cases such as those above, trial courts had denied motions to dismiss made on grounds that the accused was constitutionally precluded from being put to trial itself. The rulings were treated as appealable, final orders because forcing defendants to trial and postponing review to appeals from convictions would be inconsistent with protection of the right asserted. This rationale includes a Blackledge v. Perry claim.

Mr. Justice Rehnquist, dissenting in Blackledge v. Perry, had this to say about our double jeopardy analogy, 417 U.S. 32 at 35:

> Indeed, it is not a little puzzling that the Court's remedy is the same that would follow upon a conclusion that the bringing of the new charges violated respondent's rights under the Double Jeopardy Clause. And the Court's conclusion that '[t]he very initiation of the proceedings against respondent in the Superior Court thus operated to deny him due process of law' surely sounds in the language of double jeopardy, however it may be dressed in due process garb.

The only proper basis upon which a motion to dismiss under Rule 27(a) of the Federal Rules of Appellate Procedure should be granted is a finding that an appeal is frivolous. But defendant obviously is on solid ground in having taken a pretrial appeal. Indeed, his case is closer to Beckerman, and stronger, than the Alessi cases which are precedent in this Circuit. The government's motion for summary dismissal should have been denied.*

The question now before the Court in this petition for in banc hearing is the uniformity and integrity of this Court's decisions. Apparently, there is strong disagreement within this Circuit concerning the proper rule of appealability. Respectfully, the rift appears as set forth below, bases on the composition of the panels in United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975) (Holden, District Judge, with Hays and Feinberg, Circuit

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* The government's suggestion that the appeal is taken solely for purposes of delay is tied to its position that the appeal is frivolous. The record refutes both positions. Judge Lasker deemed the merits worthy of a 13-page memorandum decision (plus 2 pages of footnotes). Moreover, he had been advised beforehand by the parties that an immediate appeal would be taken no matter who prevailed on the motion; nonetheless, the government made vociferous claims of delay; but the court made no finding or intimation whatsoever that defendant was attempting to stall the trial.

Judges), in United States vs. Alessi, (Alessi I), 535 F.2d 978 (2d Cir. 1976) (Lumbard, with Waterman and Feinberg; all Circuit Judges), in United States v. Alessi, (Alessi II), 544 F.2d 1139 (2d Cir.) (Friendly, with Van Graafeiland; Feinberg concurring in the result only on the appealability issue; all Circuit Judges), cert. denied, ___ U.S. ___, 97 S.Ct. 384 (1976) and in the instant case, United States vs. Rodriguez (Timbers and Meskill, Circuit Judges; van Pelt Bryan, District Judge):

Circuit Judge

For Appealability	Against Appealability
The Hon. Wilfred Feinberg	The Hon. William H. Timbers
The Hon. J. Edward Lumbard*	The Hon. Ellsworth A. Van Graafeiland
The Hon. Sterry R. Waterman*	The Hon. Thomas J. Meskill
The Hon. Paul R. Hays*	The Hon. Henry J. Friendly*

*Senior Circuit Judges

If this Court's in banc decision in Silver Chrysler Plymouth, Inc., 496 F.2d 800 (2d Cir. 1974) is any guide, most of the remaining Circuit Judges may be in the "For Appealability" column. In any event, the question presented is manifestly divisive.

If the panel feels so strongly against appealability that it will not grant rehearing and reasonably apply Circuit precedent, then rehearing in banc should be granted to preserve our credo

"Non sub homine sed sub deus et lege".*

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*The pendency before the Supreme Court of Abney v. United States, cert. granted June 14, 1976 (No. 75-6521) should not stay this Court's hand. The issue before that Court is a pure double jeopardy claim. No one can predict how much light, if any, the opinion will shed on the present case nor how soon that light will appear. Meanwhile, defendant-appellant faces a June 13, 1977, trial which Blackledge v. Perry, 417 U.S. 21, 30 (1974) "simply preclude[s]". Uniformity and integrity of administration of justice in the Second Circuit require that his appeal be heard first, absent in banc overruling of Beckerman, Alessi I and Alessi II.

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Plaintiff-Appellee

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Defendant-Appellant.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Rehearing with Suggestion for Rehearing In Banc was mailed this 16th day of May, 1977, to:

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Joseph Beeler
JOSEPH BEELER

CONCLUSION

For all the foregoing reasons, defendant-appellant's petition for rehearing should be granted, in banc if necessary.

Dated: New York, New York
May 16, 1977

Respectfully submitted,

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